IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2268 OF 2002

Shankar G. Rai
(M/s. Hotel Sudhir) ..Petitioner.
Vs.
The Commissioner of Police & anr. ..
Respondents.

WITH

WRIT PETITION NO.546 OF 2003

Shankar G. Rai
(M/s. Hotel Sudhir) ..Petitioner.
Vs.
The Hon'ble Minister
(State Excise) & anr. ..
Respondents.

....

Mrs. Veena B. Thadhani for the petitioner.
Mr. G.W. Mattos, AGP for respondent Nos.1 and 2.

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CORAM : DR.D.Y.CHANDRACHUD, J.

10th January, 2005.

P.C. :

1. The Petitioner is the sole proprietor of a business which is being conducted since 1975 in the name and style of Hotel Sudhir at City Survey 395, Kirol Gaon, Vidyavihar (West), Mumbai 400 086.

2. On 13th January, 1975 a certificate registering the establishment of the Petitioner as an Eating House was issued by the Assistant Commissioner of Police under Section 33 of the Bombay Police Act, 1951. On 23rd April, 1996 the Ward Officer, of the 'N' Ward of the Municipal Corporation informed the Superintendent of the State Excise Department with reference to the premises of the Petitioner that (i) no action was pending in his department and (ii) no unauthorized construction had been found at the site. Accordingly, the Ward Officer stated that he had no objection to a licence being granted in respect of the restaurant at the premises.

3. The Petitioner applied for the issuance of a licence in Form FL III under the Bombay Prohibition Act, 1949 for the sale of liquor. On 27th February, 1997 the Deputy Commissioner of Police stated in a communication to the Collector that there was no objection to the grant of an FL III licence to the establishment from the law and order perspective subject to due compliance of other conditions and restrictions imposed by the State Government. On 30th April, 1998, the Collector rejected the application on the ground that – (i) the construction of the hotel was unauthorized; (ii) local citizens

had objections because of a school in the vicinity; and as a result (iii) a law and order problem was likely to arise. The appeal against the order of the Collector was dismissed on 22nd July, 1998 by the Commissioner of State Excise.

4. The Bombay Foreign Liquor Rules, 1953 provide for the maintenance of certain mandatory distance from specified institutions as a condition for the grant of a licence under the Prohibition Act. Rule 45(1-C) provides that no licence shall be granted in respect of any hotel or restaurant which is situated within a distance of 75 mtrs. from any educational or religious institution, from any bus stand, station or depot of the Maharashtra State Road Transport Corporation or from the boundary of any National or State highway. The manner in which the distance is to be calculated is specified in Clause (iii) of the Explanation to sub rule (1-C). In so far as it is relevant, the provision is as follows:

> "45.(1-C)(iii). The distance referred to in clause (a) of this sub-rule shall be measured from the mid-point of the entrance of the hotel or restaurant along with the nearest path by which the pedestrian ordinarily reaches :-

(a) the mid-point of the nearest gate of the institution if there is a compound wall and if there is no compound wall, the mid-point of the nearest entrance of the institution, or

(b) the mind-point of the nearest gate of the bus stand, station or depot of the Maharashtra State Road Transport Corporation if there is a compound wall and if there is no compound wall, the nearest point of the boundary of such bus stand, station or depot, or

(c) the boundary of the National or State highway."

5. The Collector had rejected the application for an FL III licence on the ground that there exists a school in the vicinity. In the appellate order, the Commissioner noted that the distance between the school and the main entry point of the restaurant is 97 mtrs. Hence, according to him this duly satisfied the requirement of Rule 45. The application for the grant of a licence was according to him still liable to be rejected on the ground that the revenue authorities had issued a photo pass in respect of the structure of the Petitioner which indicated that this was an encroachment which had been protected for the purpose of slum improvement or redevelopment. The Commissioner held that this would not confer upon the Petitioner ownership of the land and the

structure continued to be unauthorized. The appeal was dismissed.

6. The Petitioner challenged the order of the Commissioner in a writ petition under Article 226 of the Constitution (Writ Petition 866 of 1999). On 22nd April, 1999 a statement was made by the Government Pleader before Mr. Justice B.N. Srikrishna (as the Learned Judge then was), who heard the petition, that a fresh hearing would be given to the Petitioner by the new Commissioner of State Excise who had taken charge, upon which an order would be passed on the application for the grant of an FL III licence. Accordingly the order of the Commissioner dated 22nd July, 1998 was by consent quashed and set aside.

7. Upon remand, the Commissioner passed an order on 18th May, 1999 by which the application filed by the Petitioner for the grant of an FL III licence was allowed. The Commissioner recorded that the Superintendent of State Excise had reported that the distance from the entrance to the restaurant to the main entrance to the compound containing Fatima Church and Fatima High School along the route which a pedestrian would take was

about 94.84 meters. Hence, he held that the disabilities enjoined under Rule 45 were not attracted to the case. In so far as the question as to whether the structure was authorized was concerned, the Commissioner held that the Ward Officer, 'N' Ward of the Municipal Corporation had specifically stated in his communication dated 23rd April, 1996 that no action in respect of the structure was pending and no unauthorized construction had been noticed. The Commissioner thus allowed the appeal and directed that an FL III licence be granted to the Petitioner forthwith.

8. After the order of the Commissioner an FL III licence was granted to the Petitioner on 28th May, 1999, authorizing him to sell foreign liquor during the period from 20th May, 1999 till 31st March, 2000. On 28th May, 1999 the Petitioner applied for the grant of a public entertainment licence before the Commissioner of Police under the provisions of the Bombay Police Act, 1951. The application, it would appear, was not being disposed of and in a writ petition filed by the Petitioner, a Division Bench of this Court by an order dated 16th November, 1999 directed the Commissioner of Police to decide the application within a period of six weeks. The Assistant Commissioner of Police (ACP) passed an order on 18th

February, 2000 rejecting the application of the Petitioner for a public entertainment licence. The ACP held that (i) The Commissioner of State Excise who granted the FL III licence had not considered proximity of the school to the establishment of the Petitioner; (ii) In any case the Commissioner of Police had adopted steps for challenging the order of the Commissioner of State Excise; (iii) The Petitioner had illegally commenced selling liquor since August 1999; (iv) The Petitioner failed to make a complaint to the police regarding the sale of beer in the precincts of the school on the occasion of a religious festival; (v) The premises were situated within a distance prohibited under the Prohibition Act, 1949. This order was affirmed in appeal by the Deputy Chief Minister on 1st August, 2002. The appellate authority held that (i) There was an educational institution situated within a distance of 75 mtrs. of the Petitioner's establishment; (ii) The Petitioner had illegally commenced selling liquor from August 1999 without obtaining a police licence; and (iii) The Commissioner of State Excise in his order dated 30th April, 1998 had come to the conclusion that the hotel had been constructed by encroaching upon Government land. (The attention of the appellate authority was apparently not drawn to the fact that the order of the

Commissioner dated 30th April, 1998 had been set aside by consent of parties in the order dated 22nd April, 1999 passed by a learned Single Judge of this Court.)

9. The order passed by the Commissioner of State Excise on 18th May, 1999 granting the application for an FL III licence under the Bombay Prohibition Act, 1949 was challenged in revision by the department before the State Government. The Minister of State Excise by an order dated 12th January, 2003 allowed the revision filed by the Commissioner of Police and passed an order cancelling the FL III licence. The Minister of State Excise held, relying upon the order passed by the Deputy Chief Minster on 1st August, 2002 that the establishment of the Petitioner was situated within a distance of 75 mtrs. of an educational institution. Besides, placing reliance on the order passed by the State Government, the revisional authority held that the construction of the establishment of the Petitioner was unauthorized and was an encroachment upon the Government land and since people of difference religions reside in the area, the police department had recorded an opinion to the effect that a question of law and order is likely to arise in future if the licence were to be granted.

10. Both these petitions challenging respectively (i) the order passed by the Deputy Chief Minister rejecting the appeal against the refusal to grant a public entertainment licence under the Bombay Police Act, 1951 and (ii) the order of the Minister of State Excise cancelling the FL III licence were admitted. Interim relief was refused in Writ Petition 546 of 2003 which was directed against the order of the Minister of State Excise cancelling the FL III licence. The Petitioner carried the matter in a Special Leave Petition to the Supreme Court. The Supreme Court granted leave to appeal and disposed of the appeal on 24th April, 2003. The Supreme Court stayed the operation of the order cancelling the FL III licence under the Bombay Prohibition Act, 1949 pending the disposal of Writ Petition 546 of 2003 before this Court.

11. When this petition came up for hearing and final disposal, the principal bone of contention between the parties was in regard to whether the distance between the establishment of the Petitioner and the educational institution situated in the vicinity was less than 75 mtrs. as prescribed by Rule 45 (1)C of the Bombay Foreign Liquor Rules, 1953. On 13th April, 2004 an order was passed by

Mr. Justice S.U. Kamdar, with the consent of parties, by which the Prothonotary & Senior Master was directed to appoint an architect from her panel as Commissioner to visit the site and measure the distance from the entry point of Fatima High School to the entry point of the Petitioner's establishment in accordance with the provisions of Rule 45 of the Bombay Foreign Liquor Rules, 1953. Nadkarni & Co. who were appointed in pursuance to the order of the learned Single Judge submitted a report dated 23rd April, 2004. The report of the architects is to the effect that the compound of Fatima High School has a school building and a Church building situated along Kirol Road, with two gates in the compound wall facing Kirol Road. Hotel Sudhir is situated at the junction of Kirol Road and Village Road. The architects noted that originally Hotel Sudhir appears to have had two entrances – one facing Kirol Road and the other in the rear accessible through a gate facing Village Road. However, according to the architects the entrance from Kirol Road which has a wooden door has been blocked by a three feet high brick masonry plastered wall constructed in the door opening, leaving the wooden door and the rolling shutter intact. The Court Commissioner has noted that the customers of the Petitioner's establishment are using the rear entrance.

Accordingly, the Commissioner has presented his measurements in accordance with Rule 45 which are as follows :

"From Gate 1 of Fatima High School to Rear Entrance (which is in use) of Hotel Sudhir = 83.75M and
From Gate 1 of Fatima High School to Front Entrance (which is blocked) of Hotel Sudhir = 44.60M"

12. Counsel appearing on behalf of the Petitioner has submitted that in view of the report of the Court Commissioner it is abundantly clear that the only entrance to the establishment of the Petitioner which is in use is beyond the prescribed distance of 75 mtrs. which is required to be maintained from an educational institution under Rule 45 of the Bombay Foreign Liquor Rules, 1953. Counsel submitted that originally the police had granted their no objection for the issuance of an FL III licence on 27th February, 1997. In the order of the Commissioner dated 22nd July, 1998 as well as in the subsequent order of the Commissioner dated 18th May, 1999 distance was never in issue since the first of the said orders recorded the distance as 97 mtrs. whereas the subsequent order recorded it as 94.84 mtrs. Counsel submitted

that while cancelling the FL III licence the Minister of State Excise did not considered the issue of distance at all, since he merely relied upon the order that was passed by the Deputy Chief Minister on 1st August, 2002 dismissing the appeal against the refusal of a public entertainment licence. His submission was that the Deputy Chief Minister's order dated 1st August, 2002 furnishes no basis at all for the finding that the distance from the educational institution was within 75 mtrs. Moreover, it was urged that the Deputy Chief Minister had clearly fallen in an error in relying upon the order of the Commissioner dated 30th April, 1998 holding that the construction of the Petitioner's establishment was unauthorized, when that order was admittedly set aside by consent by a learned Single Judge of this Court. Moreover, it was urged that the Municipal Corporation had in its letter of 23rd April, 1996 clarified that there is no unauthorized construction and no action was pending in respect of the establishment of the Petitioner.

13. On the other hand, the AGP appearing on behalf of the State has submitted that the report of the Commissioner shows that originally the entrance to the establishment of the Petitioner was within a distance of 75 mtrs. It is only subsequently that the rear

entrance has been put to use so as to ensure compliance with the requirements of Rule 45 of the Bombay Foreign Liquor Rules, 1953.

14. The principle question which requires determination is as to whether the application for the grant of an FL III licence was liable to be rejected on account of the establishment of the Petitioner falling within the mandatory distance that must be maintained between institutions of a specified class and the establishment of a restaurant or hotel that seeks a licence under Rule 45. Rule 45(1-C) requires a distance of 75 mtrs. inter alia from an educational or religious institution. The distance is required to be measured from the mid point of a Hotel or a restaurant along the nearest path by which the pedestrian ordinarily reaches the mid point of the nearest gate of the institution if there is a compound wall, and if there is no compound wall, the mid point of the nearest entrance of the institution. The report of the Court Commissioner notes that the entrance which is being used for access to the establishment is the entrance which is depicted on the plan annexed to the report as the rear entrance. The distance between the rear entrance and the establishment of the school is stated to be 83.75 mtrs. This factual determination of the Commissioner has not been contested by the

learned AGP in his submissions before the Court. The report of the Commissioner records that the other entrance which is marked as the front entrance in the plan annexed to the report has been blocked by a three feet high brick masonry plastered wall constructed at the opening of the door leaving the wooden door and the rolling shutter intact. I am of the view that there is merit in the submission of the AGP to the extent that the Petitioner must be subjected to specific directions to the effect that the entrance which has been depicted on the plan annexed to the Commissioner's report as the front entrance (wherefrom the distance to the gate of Fatima High School is 44.60 mtrs.) shall not be used for any purpose whatsoever and that it shall be permanently barricaded by constructing a brick masonry plastered wall in its place. For convenience, the rear entrance which is to be used by the establishment of the Petitioner for purposes of access is marked as 'A'" and the entrance which is to be barricaded by the construction of a brick masonry wall is marked as 'B" in the plan annexed to the report of the Commissioner. Counsel appearing on behalf of the Petitioner has tendered an unconditional undertaking on behalf of the Petitioner, who is present in Court, that the Petitioner shall carry out the aforesaid work with due

permission of the Municipal Corporation. Upon such work being carried out, the Commissioner of Police is directed to cause a verification to be made by a competent officer to ensure that the entrance marked as 'B' in the report of the Court Commissioner has been permanently disabled from use. The Petitioner has also undertaken, through Counsel, to remove the sign board if any above or in the vicinity of the entrance point marked 'B' in the plan annexed to the report of the Commissioner and to cease and desist from placing any sign board at point 'B' or nearby at any point of time in the near future.

15. Reliance has been placed by the Petitioner on three unreported decisions of learned Single Judges of this Court. The first is a decision of Mr. Justice M.L. Pendse delivered on 12th December, 1986 in Monappa Annu Devadiga v. State of Maharashtra (Writ Petition 736 of 1986). Before the learned Single Judge reliance was sought to be placed on the provisions of Rule 5 (1) of the Public Entertainment Rules which empowers the Commissioner of Police to satisfy himself that (i) the applicant is suitable; (ii) that the locality where the place of entertainment is to be opened is fit for the purpose proposed; (iii) that the place

proposed to be used as a public entertainment is fit for the purpose for which it is proposed to be used; (iv) that the means of entrance to and exit from the place are convenient, easy, sufficient and satisfactory and (v) that sufficient arrangements for ventilation and precautions against fire have been taken. On behalf of the Commissioner of Police, it was urged that the Commissioner was justified in declining to grant permission for a beer bar in the near vicinity of a Gurudwara. M.L. Pendse, J. (as he then was) held that the submission had no merit. The learned Judge held that Rule 5 was extremely vague and that no guideline has been furnished to determine which place could be treated as an unsuitable place. The same rationale was followed in a judgment of Mr. Justice K.Sukumaran delivered on 22nd June, 1992 in Prabhakar Bhujangarao Patil v. The Commissioner of Police (Writ Petition 1031 of 1992). The learned Single Judge held that the existence of a Masjid in an area proximate to the place where the licence was proposed was not ground enough to reject the application for a licence under the Prohibition Act. Mr. Justice A.P. Shah in a decision rendered on 21st October, 1999 in Janaki Ratnakar Shetty v. The Commissioner of Police (Writ Petition 2198 of 1998) considered these earlier decisions of the learned Single

Judges. The learned Judge held that the restrictions placed under the Bombay Prohibition Act, 1949 are far more stringent than the restrictions that have been placed under the Bombay Police Act, 1951. When the authorities were satisfied that the requirement of the Prohibition Act have been duly met, there is no justification for the authorities to reject an application for a public entertainment licence under the Bombay Police Act, 1951. In so far as the proximity of a school or Church was concerned, the learned Single Judge relied on the earlier decisions. The decision of M.L. Pendse, J., it must be noted, has been confirmed in appeal by a Division Bench on 8th January, 1987 (State of Maharashtra v. Monappa Annu Devadiga - Appeal No. 7 of 1987 in Writ Petition736 of 1986). A Petition for Special Leave to Appeal (S.L.P. (Civil) 6948 of 1987) was dismissed by the Supreme Court on 12th October, 1987. The observations in the judgment of Mr. Justice A.P. Shah are relevant to the facts of this case. In the present case also, an FL III licence was issued under the Bombay Prohibition Act, 1949 after a no objection certificate was in fact granted by the Deputy Commissioner of Police. It was after the FL III licence was granted on 20th May, 1999, that the police authorities declined to grant a licence for the public entertainment. The Deputy Commissioner

while declining to grant a public entertainment licence in his order dated 18th February, 2000 placed reliance on the order of the Commissioner of State Excise dated 22nd July, 1998 though that had been specifically set aside. In view of the decision of Mr. Justice A.P. Shah noted above, I am of the view that the authorities exercising their jurisdiction in the matter of the issuance of a public entertainment licence transgressed the limits of that jurisdiction in seeking to reopen those very issues which were concluded in the order of the appellate authority allowing the issue of a licence in Form FL III under the Bombay Prohibition Act, 1949. Be that as it may, since the FL III licence was subsequently sought to be cancelled by invoking the revisional jurisdiction, I have also considered it appropriate to deal with the order of cancellation which has been impugned in these proceedings as well.

16. In so far as the question of the authorization of the premises is concerned, the Municipal Corporation in its communication dated 23rd April, 1996 addressed to the Superintendent of the State Excise department has noted that no unauthorized construction has been found to be carried out and no action is found to be pending against the establishment of the Petitioner. Undoubtedly,

in the event that there is any unauthorized construction or a violation of the provisions of the Mumbai Municipal Corporation Act, 1888, the bye laws or regulations framed thereunder, or any other provisions of law, it would be open to the competent authority to take action in accordance with law. Similarly, the finding that the establishment of the Petitioner is situated on Government land and that a photo pass has been issued in respect thereof cannot furnish a ground to deny an FL III licence or a public entertainment licence. The establishment, it must be noted, has already been registered as an Eating House under Bombay Police Act, 1951. That apart, the grant of a licence does not confer any ownership upon the Petitioner or any right, title or interest in respect of the said land. In the circumstances, this order shall not be construed as coming in the way of the appropriate statutory or regulatory authority taking such steps in accordance with law if there is any encroachment.

17. In the circumstances, both these petitions are allowed. The order dated 1st August, 2002 passed by the appellate authority dismissing the appeal of the Petitioner against the refusal of a public entertainment licence under the Bombay Police Act, 1951 is

quashed and set aside. The order of the Minister of State Excise dated 12th January, 2003 cancelling the FL III licence under the Bombay Prohibition Act, 1949 is quashed and set aside. The Commissioner of Police is directed to issue to the Petitioner a public entertainment licence in respect of the establishment, subject to the following conditions being observed by the Petitioner :

i) The Petitioner shall within a period of four weeks from today permanently close the erstwhile entrance (marked as the front entrance in the report of the Court Commissioner dated 22nd April, 2004) to the establishment abutting Kirol Road, more particularly marked by letter 'B' in the plan appended to the report dated 22nd April, 2004;

ii) The Petitioner shall remove any sign board above or in the vicinity of the aforesaid entry point marked by the letter 'B' in the plan annexed to the report of the Commissioner dated 22nd April, 2004 and shall not at any point of time in future place any sign board in the same position or in the near vicinity.

iii) The Petitioner undertakes before this Court through the learned counsel that the closing of the access point marked by the letter 'B' in the plan annexed to the report of the Commissioner shall be carried out with due permission of the Municipal Corporation and by means of a brick masonry wall complete in all respects and that at all times in future the only access to the premises shall be maintained from the point marked as 'A' in the plan annexed to the report of the Court Commissioner so as to provide access to the establishment of the Petitioner from Village Road.

iv) The Respondent authorities shall take steps for the grant of a public entertainment licence upon due verification that the Petitioner has complied with the conditions imposed herein above, and subject to all other conditions that are required under law.

18. Both the Petitions are accordingly disposed of. No costs.